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No. 92-612

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In The

Supreme Court of the United States

October Term, 1992

LAWRENCE MACKIN, ET AL.,

Petitioners,

v.

CITY OF BOSTON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF OF RESPONDENT BOSTON CHAPTER OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court and the Court of Appeals for the First Circuit correctly found that the Boston Fire Department has not yet satisfied the conditions precedent to exemption from the affirmative action provisions of a judicial decree.

2. Whether the District Court and the Court of Appeals for the First Circuit correctly determined that the decree was narrowly tailored to remedy concededly discriminatory hiring practices.

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Respondent Boston Chapter of the National Association for the Advancement of Colored People, Inc. ("NAACP"), respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

This case involves a collateral challenge to a judicial decree intended to remedy the racially discriminatory hiring practices of, *inter alia*, the Boston Fire Department ("BFD"). In 1972 and 1973, respondents NAACP and the United States brought separate actions challenging the discriminatory practices of both state and local officials in connection with the recruitment, examination and hiring of firefighters throughout the Commonwealth of Massachusetts. The actions were consolidated in the District Court before Judge Frank H. Freedman who held, after trial, that state civil service officials and numerous Massachusetts fire departments, including the BFD, had discriminated against black and Spanish-surnamed applicants in violation of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The District Court's decision is reported in *Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. 507 (D. Mass. 1974).

Judge Freedman's conclusion was principally based on two factual findings. First, statistics demonstrated a gross disparity between the percentage of black and Spanish-surnamed people in the cities and towns that were subject to civil service laws and the percentage of such persons employed in the fire departments of those communities. For example, in the case of Boston, black and Spanish-surnamed persons made up approximately 23% of the population of the city, but only 0.9% of the firefighters in the Department. 371 F. Supp. at 514. Second, the District Court found that the test that Massachusetts civil service administrators had administered to

applicants for firefighter positions over the preceding two decades or more had not been prepared by professionals in psychological measurement or testing, and that only two of the numerous parts of the test were job-related, and those only marginally so. *Id.* at 511, 517. Petitioners in this case do not challenge the soundness of these findings. *See Mackin v. City of Boston*, 969 F.2d 1273, 1275 (1st Cir. 1992).

In prescribing a remedy for the effects of this history of racial discrimination, the District Court, among other things, decreed that the respondent state civil service administrators must certify, in response to requisitions by the Boston and Springfield fire departments, lists of qualified applicants of whom no less than half were to be black or Spanish-surnamed.[1] 371 F. Supp. at 522-23. A smaller proportion (twenty five percent) of black and Spanish-surnamed candidates was required for other cities and towns where the underrepresentation of minorities was found to be less severe. *Id.* Importantly, the decree never has required the BFD or any other department to *hire* any number or percentage of black or Spanish-surnamed applicants, but rather requires merely that the fire departments *consider* applicants from a pool in which minorities comprise a certain proportion. Each fire department, including the BFD, has retained the right to

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[1] To be considered "qualified," all applicants must pass a civil service examination that has been validated in accordance with regulations promulgated by the Equal Employment Opportunity Commission or otherwise has been shown to have no discriminatory impact. *Id.* at 521.

reject, or "bypass," any applicant as long as it provides a job-related reason for doing so.

The decree also specifies that each municipality subject to its provisions may petition for exemption when it "achieves a complement of minorities [in its fire department] commensurate with the percentage of minorities within the community." *Id.* at 523. Thus the duration of the affirmative action provisions of the decree is largely within the control of the local officials responsible for the recruitment and appointment of firefighters.

The defendants in *Beecher* appealed Judge Freedman's ruling, but a unanimous Court of Appeals affirmed, approving the decree in its entirety. *See Boston Chapter N.A.A.C.P., Inc. v. Beecher*, 504 F.2d 1017 (1st Cir. 1974)(Campbell, J.). The Court of Appeals carefully evaluated the decree and noted, among other things, that "[i]n no case must any unqualified minority person be appointed; if no qualified applicants are available, none will be appointed." *Id.* at 1027. The Court of Appeals specifically found that "[t]he relief goes no further than to eliminate the lingering effects of previous practices that bore more heavily than was warranted on minorities" and that the decree was "carefully limited in extent and duration." *Id.* This Court denied review of the decision by the Court of Appeals. 421 U.S. 910 (1975).

Since the decree was entered, over half of the Massachusetts fire departments initially subject to the decree have attained exemption from its provisions governing composition of the eligibility pool by achieving minority representation at or exceeding the minority population of the relevant community. *See* Petition for Writ of Certiorari

("Petition") at 9. The BFD itself has not yet requested exemption because the complement of minorities on its force is not yet commensurate with the percentage of minorities in Boston.[2] The BFD's failure to achieve parity is largely due to the fact that in actual hiring the BFD has historically "bypassed" (that is, rejected) a disproportionate number of minority candidates certified as eligible by state civil service officials.

Petitioners, white candidates for employment as firefighters, filed this action on September 14, 1989, challenging the continued application to the BFD of the certification ratios set forth in Judge Freedman's 1974 decree. As summarized in the opinions of the District Court and Court of Appeals for the First Circuit (reprinted at pages 1a through 30a of the Appendix), petitioners contend that the conditions for exemption from the affirmative action provisions of the decree have been met by the BFD and that therefore any preferential consideration of minority applicants unlawfully discriminates against petitioners on the basis of race in violation of the Equal Protection Clause and 42 U.S.C. § 2000e.

Petitioners' claims were resolved against them in rulings on cross motions for summary judgment filed by all of the parties. At the outset, petitioners based their claim

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[2] As of November 1, 1990, minorities comprised 23.6% of the tenured members of the BFD. Appendix to the Petition for Writ of Certiorari ("Appendix") 23a. According to the 1990 federal census, minorities comprised 29.72% of those who were aged 18 and over at the time of that census. Appendix 19a.

that the BFD had attained parity, thus requiring exemption from the decree, on the contention that the percentage of black and Spanish-surnamed firefighters in the BFD at the time they instituted suit exceeded the percentage of black and Spanish-surnamed persons in the population of Boston at the time the decree was entered in 1974. The District Court rejected this anomalous interpretation of the decree, finding that parity is a condition to be assessed by reference to the *present* population of Boston, not its population in 1974. Using 1980 census statistics, the District Court held that as of June 1991 parity had not yet been achieved.[3] Appendix 23a-24a.

Judge Skinner also rejected petitioners' contention that the decree itself was invalid. Applying the most recent Supreme Court precedents, he held that Judge Freedman's findings justified the remedial provisions of the decree and rejected petitioners' assertion that the decree was not narrowly tailored to achieve its remedial purpose. Appendix 25a-30a.

Petitioners immediately filed a motion for reconsideration, asserting for the first time that compliance with the decree should be measured by reference to the percentage of minorities in the more limited labor pool rather than the percentage of minorities in the general population.[4] They also changed their position with respect to the use of contemporary census figures,

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[3] The parties' cross motions for summary judgment had been filed in early 1991, before the results of the 1990 federal census had been published. Appendix 19a.

[4] Massachusetts law requires that firefighter candidates be at least 19 years of age. *See* Mass. Gen. Laws c. 31, § 58.

although they advanced as determinative data from the 1980 census despite the recent publication of the 1990 census. Petitioners further asserted for the first time in their motion papers (and without supporting argument or citation) that the class of persons whose injuries were remedied by the decree should be subdivided into separate classes of blacks, on the one hand, and Spanish-surnamed persons, on the other. The District Court denied the motion for reconsideration, noting that even if it considered the more limited labor pool of black and Spanish-surnamed persons over age 18, the newly-available 1990 census data showed that the BFD had not yet achieved the parity required for exemption from the decree. Appendix 19a.

On appeal, the Court of Appeals for the First Circuit unanimously affirmed the District Court in all respects. *Mackin v. City of Boston*, 969 F.2d 1273 (1st Cir. 1992). Petitioners now seek review in this Court.

REASONS FOR DENYING THE WRIT

The thorough analysis of the Court of Appeals, and the careful decisions of the District Court it affirms, faithfully apply the opinions of this Court. The lower courts neither faced nor resolved any novel issue of law. Indeed, petitioners have not identified a single deviation between the decisions below and those of any other court, state or federal. In short, none of the considerations favoring a grant of certiorari set forth in Supreme Court Rule 10 are present here.

Furthermore, the essence of petitioners' case, and of their petition to this Court, is factual: has the BFD in fact satisfied the conditions of a federal court decree? The material facts of this case were resolved against petitioners by the unanimous courts below in decisions carefully grounded in the record. Petitioners' dissatisfaction with those decisions does not provide reason for review by this Court. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is . . . cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error"); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

Accordingly, the petition for a writ of certiorari should be denied.

I. THE COURTS BELOW CORRECTLY FOUND AS A FACTUAL MATTER THAT THE BFD HAS NOT SATISFIED THE CONDITIONS FOR EXEMPTION FROM THE DECREE.

A. The Lower Courts Correctly Held That Compliance With The Decree Is To Be Determined By Reference To Contemporary Population Statistics.

In their motion for summary judgment, petitioners initially contended that the BFD had achieved exemption from the decree because the percentage of black and Spanish-surnamed firefighters in the BFD in 1990 exceeded the percentage of black and Spanish-surnamed

persons in the population of Boston in 1974, when the decree issued. Both the District Court and the Court of Appeals properly rejected this theory and held that the language of the decree, the longstanding practice of all parties subject to its provisions, and common sense clearly required the use of contemporary population figures in the assessment of parity. *See* 969 F.2d 1273, 1276-77; Appendix 24a.

Judge Selya's analysis for the Court of Appeals is equally dispositive of petitioners' fall-back position, asserted in their petition to this Court, that the relevant measure of compliance under the decree is the black and Spanish-surnamed population of Boston as of 1980, a year having no special significance to the events at issue in this case. Petition at 6-7. Petitioners have advanced no reason to disregard Judge Selya's admonition that "[o]ne implication of recent Supreme Court school desegregation decisions is that federal courts, at least in the mine-run of civil rights and constitutional reform cases, have no choice but to make decisions about the maintenance, modification, or dissolution of structural remedial orders by referring to the most current population statistics available." 969 F.2d at 1276-77. This lesson is underscored by the recent decisions of this Court that emphasize the importance of flexibility in assessing existing decrees under changing conditions. *See generally Rufo v. Inmates of Suffolk County Jail*, 112 S. Ct. 748, 758 (1992). In measuring compliance by the most recently available statistics, namely, the 1990 census data, the courts below followed the lead not only of this Court but also of other federal courts that have utilized contemporary census data to

measure satisfaction of the goals of judicial decrees affecting the hiring of public safety officers. *See, e.g., United States v. City of Buffalo*, 721 F. Supp. 463, 467 & n.8 (W.D.N.Y. 1989).

B. The Lower Courts Correctly Found That The BFD Has Not Attained Parity On Any Theory Advanced By Petitioners.

Shifting gears from their original motion for summary judgment, petitioners asserted in their motion for reconsideration by the District Court that parity should be determined by reference to the percentage of minorities in the Boston population who are aged 18 and over, as opposed to the percentage of minorities in the entire Boston population. Both courts below found, as a factual matter, however, that this contention yielded no different result for petitioners.

As the District Court held in ruling on petitioners' motion for reconsideration, using data from the 1990 census, the percentage of black and Spanish-surnamed persons in the labor pool identified by petitioners substantially exceeds the percentage of minorities employed as firefighters in the BFD.[5] Further, even utilizing the 1980 census data (as urged by petitioners), the Court of Appeals found that when properly measured, the percentage of minorities in the Boston labor pool still

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[5] In a fire department the size of Boston's, the difference of only six percentage points may mean ninety or more firefighters. *See Boston Chapter, NAACP, Inc. v. Beecher*, 371 F. Supp. at 514.

exceeded the percentage of minority firefighters in the BFD. As Judge Selya noted, the Boston labor pool at the time this suit was instituted in 1989 included all persons who were ten years old or older in 1980 rather than only those who were 19 at the time of the 1980 census. Evaluated by reference to the correct data, "a continuing lack of parity in the [BFD] is statistically evident." 969 F.2d at 1279.[6]

II. THE LOWER COURTS CORRECTLY CONCLUDED THAT THE DECREE WAS NARROWLY TAILORED TO ACHIEVE ITS REMEDIAL PURPOSE.

The Court of Appeals correctly held that the decree withstood petitioners' constitutional challenge "with flying colors." 969 F.2d at 1278. Following the decisions of

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[6] In their motion for reconsideration petitioners asserted yet another wholly new basis upon which they urged that parity be found. By subdividing the class of minorities intended to be benefited by the decree into separate classes of blacks and Spanish-surnamed persons, petitioners argued that the remedial provisions of the decree should be lifted for blacks, a position adverted to in passing in their petition to this Court. Petition at 7. As the Court of Appeals correctly held, the District Court did not abuse its discretion in refusing to consider this argument, which could have been raised from the outset of suit. 969 F.2d at 1279. Moreover, in addition to the absence of factual support for petitioners' claim of "partial parity," the Court of Appeals found that their approach "clearly contradicts the format of the original litigation, which constituted combined classes of black and Spanish-surnamed persons, not separate classes [and] also contradicts the clear intent of the decree and an unbroken skein of preexisting practice under the decree's terms." *Id.*

this Court, it noted that, in evaluating the decree, a significant measure of deference is owed to the District Court. 969 F.2d at 1277. This is so because the District Court "has first hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands.'" *United States v. Paradise*, 480 U.S. 149, 184 (1987) (quoting *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 6 (1971)).

The Court of Appeals properly proceeded to test the decree along each of the various dimensions mandated by this Court. It noted that the decree does not give undue advantage to minority applicants. All applicants, including minorities, must pass a qualifying examination. Moreover, the decree only affects the composition of the pool of eligible candidates; it does not mandate who must be *hired*. As the Court of Appeals correctly found, "the decree gives only a limited advantage, not a guarantee of employment, to minority applicants." 969 F.2d at 1298, *citing Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987).

Second, the Court of Appeals correctly held that any "failure" on the part of the BFD to hire petitioners "disturbs no legitimate, firmly-rooted expectations on the part of those applicants." 969 F.2d at 1278. Petitioners' contention that the decree "trammels" their rights flies in the face of the undisputed facts. As both lower courts found, there were many other white applicants who had perfect test scores and many other applicants with lower scores but with statutory preferences that ranked them ahead of even those with perfect scores, all competing for

relatively few available positions.[7] It is simply not true that petitioners were "passed over" on account of race, since "irrespective of the decree, [petitioners] could not reasonably have felt assured that they would be appointed." 969 F.2d at 1278. *Cf. Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83 (1986) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job").

Further, as the Court of Appeals accurately observed, the decree's affirmative action provisions have only a limited life, expiring by their own terms as the requirement of parity between the percentage of minorities in the population and the percentage of minorities in the fire department is met by each community that is subject to those provisions. 969 F.2d at 1278. As Judge Skinner found, "[o]f the fifty eight communities initially subject to the court decree, thirty four have reached 'parity' and have been exempted from the decree." Appendix 23a. The expiration of the decree under its own terms with respect to the majority of other fire departments demonstrates that it was, and remains, narrowly tailored. *Cf. Paradise*, 480 U.S. at 178-79 (noting that the effectiveness and flexibility of a hiring order was demonstrated by its partial suspension after decree first issued). The BFD's own inability – in contrast to the majority of Massachusetts

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[7] The statutory preferences include firefighters laid off from other departments, veterans, and children of firefighters and policemen who were killed or rendered disabled in the line of duty. *See* Mass. Gen. Laws c. 31, §§ 26, 40. Despite the small number of available positions, however, during the pendency of this litigation about one third of the petitioners were in fact appointed to the BFD.

fire departments – to achieve parity is the result of its own recruitment and hiring practices, practices that are largely unaffected by the decree.

In challenging the validity of the decree, petitioners have never claimed that it was not sufficiently justified by findings of discrimination or not sufficiently narrowly tailored to achieve its remedial purpose when it was entered. At most, they appear to be arguing that the "great strides" made by the BFD and the use of a "validated" civil service entrance exam justify exemption or indicate that there is no longer a basis for issuing the decree in the first place.[8] There is no reason, however, to dissolve this remedial decree or excuse full compliance with its terms simply because the BFD may have made progress towards the goal of the decree. Moreover, compliance with the decree does not retroactively nullify the undisputed findings of discrimination that justified its entry. *See United States v. City of Buffalo*, 721 F. Supp. at 467 ("No new finding of discrimination is necessary" where terms of race-conscious remedial decree not yet fully satisfied). Petitioners' apparent reliance on *City of Richmond v. J.A. Croson Company*, 488 U.S. 465 (1989), and *Wygant v. Jackson Board of Education, supra*, is simply misplaced, for there is no dispute that the District Court entered the remedial, race conscious decree on the basis

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[8] Contrary to petitioners' assertions, it is not true that firefighter candidates are now administered a validated exam. *See* Appendix 27a-28a. In any event, the courts below did not resolve this issue because they correctly concluded that it was immaterial. 969 F.2d at 1277 & n.3; Appendix 28a.

of firm and specific evidence of the BFD's history of racially discriminatory practices.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari does not present any question warranting this Court's review, and the Court should deny the petition.

Respectfully submitted,

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